

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

BERNARD AUGUSTINE,

Defendant.

\* \* \* \* \*

\* Case No. 18-CR-00393(SJ)

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\* Brooklyn, New York

\* October 30, 2018

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TRANSCRIPT OF CRIMINAL CAUSE FOR BAIL APPLICATION  
BEFORE THE HONORABLE ROBERT M. LEVY  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Government:

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For the Defendant:

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1 (Proceedings commenced at 1:43 p.m.)

2 THE CLERK: Criminal cause for a bail hearing,  
3 United States vs. Augustine, case no. 18-CR-393.

4 Counsel, Please state your appearances for the  
5 record.

6 MR. KEILTY: Good afternoon, Your Honor. Mike  
7 Keilty for the Government.

8 THE COURT: Good afternoon.

9 MR. JACOBSON: Good afternoon, Your Honor. Sam  
10 Jacobson, Federal Defenders, on behalf of Bernard Augustine,  
11 who's present next to us. We're joined today by Allegra  
12 Glashausser, co-counsel, and Rachel Bass, a paralegal in our  
13 office.

14 THE COURT: Good afternoon.

15 MS. CARTER: Bianca Carter from Pretrial Services.

16 PRETRIAL SERVICES OFFICER: Shanay Kehehei (ph).  
17 Pretrial Services.

18 THE COURT: Good afternoon.

19 MS. CARTER: Good afternoon, Your Honor.

20 THE COURT: So I believe we're here on defendant's  
21 motion.

22 MR. JACOBSON: Yes, Your Honor. Thank you.

23 I'm not sure if Your Honor has had a chance to  
24 review the pretrial report that we just received --

25 THE COURT: No.

1 MR. JACOBSON: -- or the Government's detention  
2 memo in this case, but I'm happy to fill the Court in on some  
3 of the background.

4 THE COURT: Sure. I'd like to see the pretrial  
5 memo if I could. Oh, here it is. All right. Give me just a  
6 minute to take a look at it. I have read the Government's of  
7 February 27th.

8 (Pause.)

9 THE COURT: All right. Thank you. I've read it.

10 MR. JACOBSON: Thank you, Your Honor.

11 If I may, I'd like to start by backing up a little  
12 bit in the time line. I think the Government sort of  
13 outlines their understanding of what happened with Mr.  
14 Augustine in Tunisia. I just wanted to talk a little bit  
15 about his family history leading up to his time in Tunisia.

16 So Mr. Augustine's parents divorced. Mr.  
17 Augustine's father remarried. And then -- and this was just  
18 an incredibly traumatic episode for the family.

19 But Mr. Augustine's father, when Bernard was 18,  
20 was arrested and convicted of a double homicide and two  
21 attempted murders. It was a domestic dispute. And he had  
22 tried to kill his new wife, Mr. Augustine's stepmother.  
23 Bernard had just graduated from high school. The family was  
24 just totally reeling from this experience.

25 Bernard lived with his mother and continued to live

1 with his mother and his two sisters. And they're still in  
2 the same house that they've always been in in Keyes, which is  
3 outside of Modesto, California. Bernard had a very normal  
4 childhood growing up in California. And all of a sudden this  
5 totally unexpected horrific thing happens to the family.

6 He's 18. Within a few months, he, like a lot of  
7 young kids, is on the internet. He is looking at alt-right  
8 blogs, at far right message boards, at just a whole range of  
9 sort of political ideology.

10 And he -- and again, it was just a very diverse  
11 series of ideological opinions on message boards. There's  
12 obviously a lot of strange and often radical stuff, not just  
13 about ISIS, but alt-right, forum posters, and he's reading  
14 all of this stuff.

15 And within a few months of this murder that his  
16 father committed, and is now serving a life sentence for,  
17 Bernard gets on an airplane to Tunisia. And we have no --  
18 there's no dispute about that.

19 He hadn't really been outside of the United States  
20 except to Canada other than having been born in India. So  
21 he's living this very small town suburban life. This  
22 horrific thing happens. Within a few months he's on an  
23 airplane.

24 And a few days after that, he's arrested in a town  
25 in Tunisia, really just walking through Tunisia. He had been

1 in the capital, Tunis.

2 He had essentially been a tourist and had been  
3 seeing the sights and writing letters home to his family.  
4 And he's arrested and he is processed through the Tunisian  
5 court system and is ultimately convicted and is sentenced to  
6 two years in Tunisian custody.

7 And by all accounts, he really -- he did great in  
8 Tunisian custody. I mean, it's a -- it was horrible,  
9 abominable conditions, but he -- I mean, while other kids  
10 might be in college, he's in Tunisian prison simply for --  
11 he's in Tunisia. He's arrested. He's in Tunisian prison.  
12 He's educating himself. He is friends with a very diverse  
13 group of individuals in Tunisian prison.

14 And he was -- they assigned him to what was called  
15 -- they segregate people by nationality. He was assigned to  
16 the European room. He was doing great in the European room.  
17 He was by all accounts somewhat of a peacemaker in the room  
18 and was reading books. And he learned French from some of  
19 the French individuals. And served his time with no  
20 incidents whatsoever, no infractions, no bad words about him  
21 from the Tunisian authorities.

22 And at the end of his two-year sentence, he's  
23 turned over to the FBI. He's in Tunisian -- because he's an  
24 American citizen, they send him into Tunisian immigration  
25 custody to deport him and the FBI comes and gets him and

1 flies him back to the Eastern District of New York where he's  
2 arrested for attempting to provide material support to ISIS.

3 He knew that that was going to happen. He was  
4 informed -- the FBI had come to see him much earlier in his  
5 two-year time in Tunisian custody and he basically knew that  
6 this was going to happen and he was resigned to it.

7 And, in fact, we have letters -- after he knew that  
8 he was going to be prosecuted here in the United States --  
9 where he tells his mother and his sisters how much he wants  
10 to come home, how much he misses them. He just wants to see  
11 them again.

12 So I think that -- and I'll address that more  
13 specifically later when we discuss risk of flight -- but I've  
14 a letter of March 9th, 2017. He's in Tunisian custody. A  
15 letter of October 6th, 2017. He's in Tunisian custody. And  
16 this is -- this was all provided by the Government as part of  
17 their Rule 16 discovery.

18 He says -- this is to -- he addresses his mother as  
19 Mama, and his sisters, Elysia and Natasha -- he says, I'm so  
20 excited to come back home, exclamation mark. I'm more  
21 looking forward to working and making some dollar sign,  
22 dollar sign, dollar sign, but I'm most looking forward to  
23 sleeping with my head on your lap and watching TV and eating  
24 your delicious cooking.

25 So I know that the Government is going to say that

1 he's a risk of flight, and I understand that that's their  
2 position on these cases, but I think any objective analysis  
3 of what his state of mind and what he's writing and what's  
4 he's feeling, all signs point to he's not a risk of flight,  
5 he's not a risk of danger.

6 Cut to March 9th of 2017, I hope -- this is towards  
7 the end of his sentence in Tunisia -- "I hope to come home  
8 before my birthday. I want to find a job and work as soon as  
9 possible, preferably something with a regular day schedule,  
10 and something physical so that I can sleep at night. I am so  
11 tired of feeling restless. Lowell, get it, restless, without  
12 rest."

13 And then he says "I really miss reading quality  
14 books and articles. I think I could be happy if I could have  
15 that. All I want is a room somewhere, far away from the cold  
16 night air, and one big, enormous chair, wouldn't that be  
17 lovely. And lots of chocolates for me to eat." Smiley face,  
18 smiley face. And I didn't know this, but that's a quote from  
19 Mary Poppins.

20 So this is the person that the Government is going  
21 to say is a risk of flight, who letter after letter is just  
22 saying I want to come home to the U.S. I know that this  
23 might happen. I just want to put this behind me and come  
24 home. I miss my mother. I miss my sister. I want to have a  
25 normal life working with the family, making money, just a

1 normal life.

2 So that's the context of being in Tunisian custody.  
3 I also think his time -- the record of his time in Tunisian  
4 custody goes to risk of danger because zero incidents in  
5 Tunisian custody. He was -- everyone liked him. He was the  
6 peacemaker. He was reading. He was sharing books with  
7 people.

8 The other thing I want to mention about his custody  
9 is there's some -- there's a good Samaritan in Tunis who runs  
10 the Anglican Church, a European man and his wife, who would  
11 come visit Christian people at the Tunisian prison. They  
12 came to visit Bernard and developed a very strong  
13 relationship with him.

14 These are Anglican pastors who are -- the supposed  
15 man who is in charge of material support here, this 19-year-  
16 old kid, and they're meeting with him in a Tunisian jail when  
17 he should be in college or at home working as a security  
18 guard, which he had been doing -- they were able to send  
19 letters home from him. Some of these letters which are --  
20 these letters read like a 19-year-old kid emailing home to  
21 his mom and his sisters.

22 So no incidents whatsoever. And I should point out  
23 that the pastor in part was visiting him because Bernard is a  
24 Jehovah's Witness and his family are very devout Jehovah's  
25 Witnesses from India.



1           So what does the FBI say about why this -- why he  
2           was attempting to support ISIS? What is their case? Their  
3           case is, when the FBI went and interviewed him in Tunisia, he  
4           said I was curious to see it. That's what the FBI report  
5           says. That when asked why he was in Tunisia, sort of walking  
6           in the -- again, he was hundreds of miles from Libya, but he  
7           was walking in that direction, and they said what were you  
8           doing? Why were you going towards the Islamic State? He  
9           said I was curious. I wanted to see it.

10           So as to risk of danger, the gap between curiosity  
11           and wanting to see something and attempting to provide  
12           material support to that organization is huge.

13           So the Government's going to point to a few  
14           isolated things that he posted on some of these alt-right  
15           message boards. And again, these are message boards for --  
16           right -- for what we know as the alt-right in the United  
17           States, which is diametrically opposed from -- to ISIS.  
18           Right? These are sort of Trump supporters who are talking  
19           about border security and caravans.

20           And he posted a few things that seemed -- that to  
21           the Government indicated were good words about the Islamic  
22           State. But what he says about his intent is I was curious.  
23           I wanted to see it.

24           And I want to point out about these message boards,  
25           these are the same alt-right message boards that are

1       constantly harping on fake news. Right? So you have a kid  
2       who is 18 years old. This traumatic thing just happened to  
3       his family.

4               He's on alt-right message boards that are talking  
5       about how there's all sorts of fake news. And then what he  
6       tells the FBI about why he's in Tunisia is I was curious to  
7       see the Islamic State. I didn't believe what the -- I wasn't  
8       sure if what the media was saying was true. Right? So sort  
9       of like almost you're a one-man journalist.

10              And that is -- for a 19-year-old kid, growing up in  
11       this atmosphere of everything is fake news, right -- the  
12       current president is talking about fake news -- obviously  
13       this was before that -- but certainly the writing on these  
14       message boards that was already the theme, everything CNN and  
15       New York Times is saying is fake news -- he's curious. He's  
16       never been outside of Keyes, California. He wants to see it.  
17       That's what he says to the FBI. This is the Government's  
18       case. Okay.

19              And once he's there and he's in Tunisian custody,  
20       all he wants to do is come home to his mother and his  
21       sisters.

22              He has spent -- he spent his two years in Tunisian  
23       custody educating himself, reading, writing, learning  
24       languages, befriending people from incredibly diverse  
25       backgrounds.

1 I mean, in a way, Tunisian prison is more diverse  
2 than MDC. I mean, there are people from Europe and Asia and  
3 all over the world and he's talking to all of these people.  
4 Now he's been at MDC. He was brought back by the FBI a  
5 number of months ago. He's been at MDC.

6 What has he been doing at MDC? Does he have any  
7 infractions? He doesn't. What he's been doing at MDC is  
8 educating himself, giving himself the equivalent of a college  
9 education, constantly asking for books, reading, reading  
10 feminist authors, discussing Roxanne Gay with people, reading  
11 languages, reading novels, reading math, really applying  
12 math, who just wants to learn and be back with his family.

13 He had this crazy experience after this traumatic  
14 episode in his family's life. It's stabilized. He was 18  
15 years old at the time. He is a 22-year-old -- 22 years old  
16 now. He's been in custody the entire time. He gets it.  
17 There's zero risk of flight or danger here.

18 And I think when Your Honor reads the Government's  
19 detention memo, the crux of their detention memo is ISIS is  
20 bad. And we're not disputing that ISIS is bad.

21 Our only point is Bernard has nothing to do with  
22 ISIS. And Bernard is good. He is incredibly good. And he's  
23 one of -- I really look up to him in many ways in how he's  
24 dealt with this adversity and what he wants to do to move  
25 forward with his life.

1           The Government is prosecuting him for a crime where  
2           the guideline range of imprisonment is 20 years. My personal  
3           view is I can't imagine a worse way to help Bernard  
4           reintegrate and rehabilitate than what they are trying to do  
5           to him. But those are their decisions. They're not mine.

6           But I think the best thing for the community  
7           ultimately is for him to be out of jail and reintegrating,  
8           and as a 22-year-old now living a normal, productive life.

9           I have letter after letter from Bernard to his  
10          parents talking about how he wants to be productive. That's  
11          what he talks about from MDC.

12          He wants -- just getting a job, continuing to  
13          educate himself, going to school, doing the things that a  
14          normal kid would do as opposed to what derailed him when he  
15          was 18 years old after what understandably for any 18-year-  
16          old kid would be just unthinkable that your father, who you  
17          respected and looked up to, is arrested for this crime.

18          And I can imagine what I -- you know, the crazy  
19          things that I might do in that situation. But nothing he did  
20          is attempting to support in any way ISIS.

21          So I want to briefly talk about the other cases  
22          that I know the Court has seen, the other cases that the  
23          Government and all the parties here have seen. These  
24          material support cases always involve at least one of the  
25          following, right?

1 Recruiting personnel, sending money, purchasing  
2 body armor weapons or discussing with people doing those  
3 things. Telling people that you were going to go fight.  
4 Being on encrypted ISIS-specific message boards and chats  
5 where you're communicating with people who could be your  
6 future handlers, people who would help you get across the  
7 border, people who you would enter into a conspiracy with.  
8 The list goes on and on. We always see one of those in these  
9 sorts of cases.

10 Zero of those factors are present in this case. He  
11 didn't talk to anyone who is a supporter of ISIS. And the  
12 Government has to agree with me on this -- because they have  
13 all of his electronic communications, both on the internet,  
14 on his phone -- he never spoke to any human who is involved  
15 in ISIS.

16 He never tried to recruit anyone to ISIS. He never  
17 sent money. He never fought for ISIS. All he did was get on  
18 a plane after being on these alt-right message boards. And  
19 his -- I don't even know how the Government characterizes it,  
20 certainly not as a confession -- but he says I was curious to  
21 see it. That is the extent of this case.

22 So when I think about -- I think there are a couple  
23 hundred or more across the country over the last few years,  
24 material support cases, the vast majority of those are  
25 substantive material support charges or conspiracy to commit

1 material support charges.

2 Bernard's is attempting to provider material  
3 support because there's -- obviously he never got anywhere  
4 where ISIS is. Even if he had gotten to Libya, ISIS is on  
5 the other side of Libya.

6 But he didn't know that because he had never done  
7 research on this sort of thing. Right? Even if you get over  
8 the border into Libya, it's hundreds of miles to Sirte where  
9 ISIS had already been obliterated by Libyan forces.

10 So even if he had gotten there, there would have  
11 been nothing for him to do or see. And he's never expressed  
12 any desire to do or see anything when he got there.

13 So really when I think about material support cases  
14 in this country -- and certainly there are many of them that  
15 are worth prosecuting and where people actually pose a danger  
16 to the community -- this has to be -- and we've read most of  
17 them -- this has to be the weakest case by far of any  
18 attempted material support for ISIS case.

19 And I don't know that the Government has any  
20 response to that because I think they know that. And so  
21 those are the charges.

22 But other than the Government detention memo, which  
23 is ISIS is a dangerous organization, therefore, Bernard is a  
24 dangerous person, the connection just doesn't hold up.

25 And I think everything points to -- if Your Honor

1 puts that trust in him, he's going to go home. He's going to  
2 find a job. He's going to continue to educate himself and  
3 continue doing the things that he's done from the time he was  
4 incarcerated in Tunisia for the last three years up until  
5 today's date.

6 The other thing I want to mention because I think  
7 Bernard's state of mind is very important in this case -- I  
8 think it's important for bail -- I also think it's important  
9 for when you're charging someone with attempt, you have to  
10 show that their intention was to do that, obviously.

11 But when we think about Bernard's state of mind --  
12 and I know Your Honor is familiar with her work, but Dr. Kate  
13 Porterfield from the NYU Center for Trauma has been meeting  
14 with him since he arrived in the United States.

15 And they've been working on sort of uncovering his  
16 thoughts and feelings and state of mind. And she has had an  
17 opportunity to speak to his family in California.

18 And again, this is a family that experienced this  
19 horrible trauma, almost four years ago at this point, but  
20 it's a family that has recovered and in many ways grown  
21 stronger.

22 We have had the -- and Your Honor is happy to --  
23 they're available by phone today, all three of our proposed  
24 suretors, and that's his two sisters and his mother.

25 But Dr. Porterfield has observed that it's an

1       incredibly resilient and strong and supportive family that is  
2       ready to receive him. And I think by the same token Bernard  
3       is ready to be reintegrated into the family and to have their  
4       support and also to support them.

5               And I think regardless of the merits of the  
6       Government's case, Bernard feels in many ways like he owes  
7       them for not being present these last years and just wants to  
8       be there with them.

9               Again, the letters from Tunisia all express how  
10      sorry -- to his mother, but also to his sisters, how sorry he  
11      is that he's not there with them and how he just wants to  
12      come back to be with them, and how strong his commitment is  
13      to being there with them.

14              And I think it really is a family where, if Your  
15      Honor were to release him, he would show that it's a family  
16      that can heal a lot of these traumas together and support  
17      each other in a meaningful way.

18              And I think the occupations of the suretors are  
19      important here. It's a family that is devoted to healing  
20      professionally. Bernard's mother, Cheryl Alphonso, is a  
21      clinical nurse educator for Kaiser Permanente in California  
22      and makes approximately \$170,000 a year. His sister is also  
23      a nurse.

24              THE COURT: This Elysia?

25              MR. JACOBSON: Elysia is a nurse as well, Your



1 Honor. And the third sister is currently a student and doing  
2 missionary work as a Jehovah's Witness. But is willing to  
3 sign for moral suasion and is also available with Cheryl and  
4 Elysia today.

5 And so what --

6 THE COURT: What was the reason why he went to  
7 Tunisia? Or can you -- is that not something you want to  
8 discuss at this hearing?

9 MR. JACOBSON: I don't want to say anything that  
10 could be privileged.

11 THE COURT: Okay.

12 MR. JACOBSON: I don't see anything inconsistent  
13 with what the FBI -- I don't see any -- I haven't heard or  
14 seen anything different from what the FBI has recorded in  
15 their own 302 and from their own investigations, which is I  
16 went because I wanted -- I was curious to see it.

17 We know that he was on message boards which were  
18 talking about fake news from an alt-right perspective. And a  
19 few months after his father commits this -- shoots four  
20 people, he's on the plane.

21 And we also know that most of what he was doing in  
22 Tunis is what a normal tourist would do because we have his  
23 messages saying I'm at this site. I'm at the beach. I'm at  
24 this restaurant. It's really great. The food is great.

25 So that's what I have. I guess what we're asking

1 the Court to do is disaggregate the charges. Which always  
2 sound scary, right, because in a case like this -- from  
3 Bernard, the human being -- who has just no affiliation with  
4 ISIS which is very rare in these cases. There's almost  
5 always communication or substantive fighting for them or  
6 something.

7 And you know, the statute, the material support  
8 statute, requires that you be under the direction or control  
9 of a designated terrorist organization. And I just -- I  
10 don't see it. I don't see their case.

11 And I -- certainly everything I see in our personal  
12 interactions with him, Dr. Porterfield's interactions with  
13 him, everything points to this guy is -- I'd say honestly --  
14 less of a risk of flight or danger than almost anyone who  
15 comes before the Court for a bail hearing. There's just no  
16 risk of it.

17 THE COURT: All right. Thank you.

18 Mr. Keilty?

19 MR. KEILTY: Your Honor, I'll be -- I'll be  
20 somewhat brief.

21 Mr. Jacobson is a zealous advocate for his client  
22 and he's done an excellent job of downplaying the seriousness  
23 of what we have before the Court right now. The Government  
24 is going to rely on its detention memo for the most part, but  
25 I just want to highlight a few things in that memo for the

1 Court.

2 Let's be clear, this defendant tried to join a  
3 terrorist organization whose mean tenet -- or one of the mean  
4 tenets is to kill westerners and kill Americans. And he came  
5 incredibly close to that, Your Honor. He got to the border,  
6 the country right before one of the strongholds of ISIS,  
7 Libya.

8 And we have evidence that he also researched  
9 possibly going into Syria through Turkey, Your Honor, but he  
10 realized that was too difficult, that the Turkish authorities  
11 might restrain him from doing that.

12 I think the important thing here is this is not  
13 somebody who was sitting behind a computer, who was just  
14 sending out derogatory messages on message boards, who was  
15 just espousing sympathy for ISIS. That's one thing. That in  
16 itself would be considered a danger to the community, that he  
17 agrees and espouses the same views as this terrorist  
18 organization.

19 This defendant took it one step further. He had  
20 the will to travel thousands upon thousands of miles with the  
21 intent to join ISIS. How do we know that? We've done  
22 searches of his computers.

23 We've done searches of family members' phones,  
24 consent searches. And those searches have revealed that he  
25 reviewed incredibly disturbing ISIS videos, beheadings. It's

1 all laid out in our detention memo, Your Honor. He's  
2 listened to sermons of radical Islamic preachers.

3 And Mr. Jacobson just -- Mr. Jacobson mentioned  
4 that when he got to Tunisia he did the same thing as any  
5 other tourist would do.

6 I think it's interesting -- and we quoted this on  
7 page 4 of the detention memo, Your Honor -- that he sent an  
8 email back to a family member from Tunisia. And if you read  
9 that email -- I'll just read a couple of excerpts from it --  
10 he talks about what is clearly martyrdom. He talks about  
11 when I die, if god accepts me, we will all live in paradise  
12 forever.

13 The good people in this world bring back balance  
14 and push back against evil and give their lives freely in  
15 this process. This is not somebody enjoying, you know,  
16 tourist activities in Tunis. This is somebody who is  
17 planning to go to Libya to join ISIS.

18 And if we go back to the searches of some of his  
19 messages on the message board, he's clearly talking about  
20 martyrdom in a lot of these messages.

21 True Islam can't be implemented without Khalifah  
22 and Khalifah can't be established and maintained except  
23 through the blood of the mujahideen who practiced the true  
24 belief based on Quran and Sunnah, the prophet. It's on page  
25 5. The Muslims who leave the west travel in the opposite

1 direction of these refugees, answer the call for struggle,  
2 and march until they are victorious or martyred are the true  
3 believers.

4 Now Your Honor, again, if this was all we had, if  
5 this was Mr. Augustine sitting behind his computer in  
6 California sending out these messages, doing these searches  
7 for how to join ISIS, it would be one thing -- I'd still say  
8 he's an incredible danger to the community based on what we  
9 have here -- but he bought a one-way ticket to join ISIS.  
10 And but not for the Tunisians arresting him, he might be with  
11 ISIS right now, Your Honor.

12 To say he's not a danger to the community ignores  
13 the Government's evidence that's proffered in this detention  
14 memo right now. I'll leave it at that with danger to the  
15 community.

16 With respect to risk of flight, Your Honor, this is  
17 somebody who was willing to purchase a one-way ticket to a  
18 completely foreign land. He wasn't going to London on a one-  
19 way ticket. Paris. He was going to Tunisia. He had no idea  
20 what he was getting into. And he tried to go to Syria having  
21 no idea what he was getting into.

22 And in fact, his family had no idea where he was  
23 going or what he was up to. I mean, the first time they hear  
24 about him in Tunisia is when he's writing these incredibly  
25 inflammatory messages back to his mother talking about

1 martyrdom.

2 I just think, based on the evidence here in this  
3 case, Your Honor -- I mean, like I said, Mr. Jacobson  
4 downplays it -- but again, this is not somebody who's  
5 sitting, eating Cheetos at a computer, you know, typing  
6 messages about how good ISIS is and how to kill Americans,  
7 this is somebody who tried to go over there to do it.

8 So for all these reasons, we agree with Pretrial  
9 Services that the defendant should remain detained, Your  
10 Honor. Pending your questions, that's all I have.

11 THE COURT: So why do you believe he went to  
12 Tunisia and what evidence do you believe there was that he  
13 went there to provide material support to terrorism?

14 MR. KEILTY: Your Honor, searches of this  
15 particular defendant's computer, search warrants executed,  
16 show searches on how to join ISIS, show searches on how to  
17 travel to join ISIS, to Libya, to Turkey in order to get to  
18 Syria.

19 I quoted some of the martyrdom language that he  
20 espoused on these various forums. He tells nobody what he's  
21 doing. He gets over to Tunisia and then starts sending  
22 messages back to his mother talking about martyrdom. The  
23 messages don't say I'm at this beautiful café. I plan on  
24 spending a couple of weeks here and then flying back. He was  
25 on his way to join ISIS.

1 I'll give you one example, Your Honor. On December  
2 15th, 2015, the defendant conducted an internet search. This  
3 is on page 5 again of the detention memo.

4 THE COURT: Right.

5 MR. KEILTY: How to safely join ISIS? How does a  
6 westerner join ISIS? Is there a recruitment or application  
7 process?

8 And also I fundamentally disagree with Mr.  
9 Jacobson's assertion that you have to have a handler in order  
10 to join ISIS. There's documented examples, Your Honor, of  
11 people going who just wander into ISIS territory and join  
12 ISIS. So the fact that he didn't have a handler is not the  
13 be all and end all for his wanting to join or his ability to  
14 join the Islamic State.

15 THE COURT: On page 6, you have a discussion of the  
16 information provided by the Tunisian government, and you  
17 discuss his conviction on charges of entering Tunisia with  
18 the intent to travel to Libya to join a terrorist  
19 organization, and intent to join, participate in training,  
20 and provide support to a terrorist organization. Do you have  
21 -- is there anything more you have that was provided by the  
22 Tunisian government or --

23 MR. KEILTY: Your Honor, we have information that's  
24 been provided by the Tunisian government, various statements  
25 that the defendant has made. We don't feel comfortable

1 turning it over in this forum.

2 THE COURT: Okay.

3 MR. KEILTY: If necessary, we will turn it over in  
4 the proper channels through the defense.

5 THE COURT: All right. And do you believe that  
6 that -- is your proffer that that information -- whether you  
7 present it in camera to the Court or through 3500 material --  
8 that that supports -- that that provides further evidence of  
9 his intent to join ISIS?

10 MR. KEILTY: I believe so, Your Honor. And he was  
11 convicted. Off the top of my head, I could not tell you  
12 exactly what his statements were other than he was convicted  
13 of attempting to travel to Libya in a Tunisian court of law.

14 THE COURT: Do you have access to those statements  
15 now or would that be something that would be more difficult?

16 MR. KEILTY: I would have to go back and check,  
17 Your Honor. We do have access to statements he made, yes.

18 THE COURT: Right. And do you know whether they  
19 discussed ISIS?

20 MR. KEILTY: I'd have to find out.

21 THE COURT: Part of them?

22 MR. KEILTY: I'd have to check, Your Honor.

23 THE COURT: Okay.

24 MR. KEILTY: If you give me one second, Your Honor,  
25 I could talk to --



1 THE COURT: Sure

2 (Pause.)

3 MR. KEILTY: Your Honor, after speaking with the  
4 agents, there's some questions whether that material is  
5 classified right now. So I wouldn't feel comfortable, at this  
6 point, in this setting informing the Court.

7 THE COURT: Okay. And is that something, if the  
8 Court thought it was necessary, you could provide in camera?

9 MR. KEILTY: Yes, Your Honor. But it's the  
10 Government's position, Your Honor, that there's more than  
11 we've -- more than enough evidence in our detention memo.

12 THE COURT: I understand.

13 Pretrial Services, Ms. Carter, Ms. Kehehei, do you  
14 have anything that you could highlight from your report that  
15 bears on your conclusion that there are no conditions or  
16 accommodations of conditions that would support this  
17 defendant's release?

18 MS. CARTER: Your Honor, I think the Government  
19 pointed out a lot of things that we have concerns about as  
20 far as his risk of flight. The fact that his family did  
21 know, he has family in India, which his mother is currently  
22 traveling to, that does make him a flight risk.

23 The nature of the offense does warn us as a danger  
24 to the community, and the prior arrest in Tunisia.

25 Additionally, we'd also like to note to the Court

1       that if Your Honor is considering release, the defendant,  
2       based on our conditions that we would impose in these type of  
3       cases -- which you know, Your Honor, would be GPS monitoring  
4       -- would not be capable where his family lives.

5               THE COURT:   Mm-hmm.

6               MS. CARTER:   So that would be another, you know,  
7       issue we'd have as far as him being on bail.  And we still  
8       stick by our recommendation that there's no condition or  
9       combination of conditions to ensure the safety of the  
10      community or his return to court.

11              THE COURT:   I have a question for the Government  
12      and it's a slightly different one.

13              What's the effect of the fact that he's already  
14      been convicted and served some time for a similar offense on  
15      the prosecution in this country?  I take it they're separate  
16      laws.  There's no bar against that obviously.

17              MR. KEILTY:   Yes.  Not that I'm aware of, Your  
18      Honor.

19              THE COURT:   And does that bear at all on whether,  
20      at this point, he is a risk of flight or he's a danger?  
21      Those two years incarcerated, is that -- is there anything in  
22      that history that you think is relevant either way pro or  
23      con?

24              MR. KEILTY:   Not particularly, Your Honor.  That  
25      may be an issue at sentencing, the fact that he's served two

1 years. But I wasn't in the Tunisian jail with him. I mean,  
2 Mr. Jacobson has proffered that he was a model prisoner. I  
3 don't know if he could have been radicalized more for all I  
4 know, Your Honor. So I can't comment on that.

5 THE COURT: Right. And do you know -- if he were  
6 released, is the plan that he would be released to  
7 California, is that it, to live with his family?

8 MR. JACOBSON: Your Honor, I'd say that that is our  
9 main proposal.

10 But taking Pretrial's points, and understanding  
11 that there might be logistical issues with him residing at  
12 the family home, we have an alternative plan, which is  
13 feasible, in that Ms. Alphonso, his mother -- we've discussed  
14 it with her -- she would be willing to take leave from her  
15 job at Kaiser Permanente, rent an apartment here New York  
16 City and reside with him here.

17 Understandably, he would be under electronic  
18 monitoring. She could stay with him. I'm sure she would be  
19 happy to sign as a third-party custodian in the case. So she  
20 -- wanting to make this happen, she's extremely flexible.

21 Anticipating that this could have been an issue in the  
22 future, she's already applied to have her nursing license  
23 transferred to the State of New York so that she could stay  
24 in a more long-term environment here. So she's open to that.  
25 She's open to it. And she can discuss it with the Court.

1 She's available today.

2 I do have a few responses to some of the things the  
3 Government has said at some point, Your Honor.

4 THE COURT: Okay. Yes, briefly.

5 MR. JACOBSON: Thank you, Judge.

6 I think also in response to the Court's question  
7 about the conviction in Tunisia going to risk of flight, I do  
8 think it's relevant in that of course there's no legal double  
9 jeopardy reason that he can't be prosecuted here.

10 But at some point, especially when it comes to  
11 crimes of universal jurisdiction, we have to say this is the  
12 end of it. Right? He has paid his dues in Tunisia for the  
13 exact same crime.

14 And so because it's a universal jurisdiction crime,  
15 what's to stop -- after he -- if he's -- if there was a  
16 conviction here, France could then extradite him. Any  
17 country could extradite him and say he's still a risk of  
18 flight, he's still a risk of danger.

19 So there's this -- in cases where any country is  
20 able to prosecute, there is a -- and it's a hypothetical  
21 risk, if it has happened yet in this case -- but I think we  
22 have to say he's been prosecuted and sentenced and has served  
23 his time in this exact case, without incident, when he was  
24 18-19 years old. Now he's 22. Tunisia has, to my mind, more  
25 sober laws on this subject than the United States does. He's

1       paid his dues. It's time for him to show that he can  
2       reintegrate, instead of prosecuting him yet again for the  
3       same exact conduct, which is merely walking through Tunisia.

4               The Government said he wasn't doing touristy  
5       things. He was. I mean, they take an isolated martyrdom  
6       post from this crazy, alt-right message board that he was on.

7               But if you actually read his messages from Tunis --  
8       this is before he was arrested -- his text messages to his  
9       mother from Tunis. "Hi, Mama. Love you too a lot. I made  
10      it. I'm in North Africa bordering the Mediterranean. It is  
11      so awesome here. I have a lot to tell you about my trip.  
12      Love you. I'm sending this message. I'm using the internet  
13      café, but I'll try to make an international call as soon as  
14      possible. Love you. I'll come back to the café to check for  
15      more messages." And there are other messages where he's  
16      talking about his time there in other letters.

17              So I think we need to make the distinction that 18-  
18      year-old kids post all manner of insanity on message boards.  
19      It's just a fact of the world. I don't -- as a 36-year-old,  
20      I didn't quite experience it.

21              But seeing younger people in my family and all over  
22      -- we see the sons of politicians in this country posting  
23      insane things on message boards, on Snapchat, on Instagram --  
24      it's how the world works. So the isolated things about  
25      martyrdom, what he's actually saying to his family about what

1 he wants to do totally contradicts that.

2 So I want to -- you can look at the same message --  
3 the same alt-right message board and he also says it's the  
4 same god, Jews, Christians, Muslims, it's the same god. I  
5 highlighted a few pieces of it. He's talking about martyrdom  
6 in the context of open borders and migration and Syrian  
7 refugees.

8 But he says -- he's talking about monotheism, it's  
9 all the same god. Men don't have to fight each other. He  
10 talks about -- he sends a message to his mother. Of course,  
11 I don't want -- he talks about how he doesn't want to be a  
12 martyr in other messages. There's a lot of messages here on  
13 the board. I don't tell anyone to join. I'm just looking  
14 for a discussion.

15 So I don't know what -- the Government's position  
16 is somehow he was radicalized at 18. He's still radical now  
17 at 22. But the messages he sends people --

18 MR. KEILTY: Your Honor.

19 I'm sorry. Are you finished?

20 MR. JACOBSON: He never says he wants to join the  
21 Islamic State. He couldn't have joined the Islamic State.  
22 He was no -- and the Government I think said he was caught  
23 near the Libyan border. He was well within central Tunisia  
24 when he was arrested. He had been in Tunis.

25 He was in a fruit market when he was arrested. I

1 just think he was 18. He's been convicted of something.

2 It's 19, sorry. He's 22 now.

3 Can't we just give him a chance to show that he can  
4 -- what is the value of punishment in this case just for the  
5 same of punishment?

6 Can't we have a sense that a kid -- even if you  
7 don't think it's criminal -- that a kid did something really  
8 foolish when he was 19 after this traumatic thing?

9 And maybe we owe it to our citizens to say we want  
10 you to be part of this community and to be able to live a  
11 productive life, especially when for the last three years  
12 everything he's been saying is that's what I want to do.

13 Everything he's -- he doesn't say it in those  
14 words, but everything shows I'm not a risk of danger. I'm  
15 not a risk of flight. I want to come home. I want to -- why  
16 would he -- he's not trying to game future discovery when he  
17 says I hope to come home before my birthday. I just want a  
18 job with a regular day schedule so I can sleep good at night.  
19 And then quotes Mary Poppins.

20 This is the terrorist that the Government wants to  
21 have in jail for having already been in jail for the exact  
22 same conduct? How long do they want to keep him in jail?  
23 How long do they want to keep him in jail? That's my  
24 question.

25 THE COURT: All right.

1 Mr. Keilty?

2 MR. KEILTY: Your Honor, to put a bow on this, the  
3 defendant repeatedly searched how to join ISIS. How does a  
4 westerner join ISIS? His computer is littered with beheading  
5 videos. I've seen them. He speaks about martyrdom. He gets  
6 to Tunisia on a one-way ticket. Right? He previously looks  
7 how to join ISIS in Syria and he can't do it.

8 So then he switches over to going to Tunisia. When  
9 he gets there, it's not like, oh, this was a mistake. Let me  
10 get back. He sends out this disturbing message to his family  
11 member about martyrdom.

12 I don't know why he quotes Mary Poppins. But Mr.  
13 Jacobson makes it sound out like he was going to join the  
14 Peace Corp, but he just didn't get there. He was going to  
15 join ISIS. The evidence is overwhelming in this case, Your  
16 Honor.

17 And it's a little bit perplexing that Mr. Jacobson  
18 would take this -- I'm not even sure of the correct word --  
19 but this is a serious, serious case. The defendant's a  
20 danger to the community. He tried to join a group that wants  
21 to kill Americans. We have no evidence that if he's released  
22 today he wouldn't go right back to believing that same  
23 philosophy.

24 THE COURT: Okay. All right. Thank you.

25 I think a number of the arguments that the defense



1 makes go to whether or not you believe there should be a  
2 prosecution, or whether or not you believe, if he were  
3 convicted, what sentencing would be and what would be  
4 appropriate.

5 And I believe also part of the argument, sort of  
6 implicit, is that whatever this defendant was thinking at the  
7 time he went, he got his one-way ticket to Tunisia, he's a  
8 changed man or at least he's not of a risk of flight or a  
9 danger to the community.

10 The Government's position is the evidence is pretty  
11 clear as to what he was doing when he went to Tunisia. And I  
12 find that that evidence is persuasive and that there's no  
13 evidence that there really has been a change.

14 One of the difficulties for a court in this  
15 situation is to know what's in someone's mind. All we know  
16 are his actions at this point and those actions are the ones  
17 that, you know, weigh in the balance.

18 There is no alternative to incarceration program  
19 for people who were young who went to, you know, to join  
20 ISIS, at least not in this district. If there were, that  
21 would be something that would be, I think, useful in a  
22 situation like this. But we don't have that. And the  
23 safeguards that would come with that we don't have.

24 So based on evidence, which at this point is  
25 several years old, it's my finding that the Government's

1 arguments do show that there was, at least at the time, at  
2 the last time that we really understood what this defendant's  
3 intentions are, a serious risk of flight and a danger to the  
4 community at that time. Whether he's changed, it's quite  
5 possible. But I just don't see the evidence there at this  
6 point.

7 And again, I wish we had an alternative to  
8 incarceration program with safeguards and with the kinds of  
9 supervision that would in a graduated way allow courts, and  
10 even the Government, to understand what a person's true views  
11 are, but we don't have that at this point.

12 So I find that the Government has met its burden on  
13 both counts. And I do think that there is some question as  
14 to what Mr. Augustine's current intentions are.

15 And it's difficult for a court to speculate as to  
16 what those are in the face of evidence that we've had in the  
17 past. So therefore, I'm finding that the Government has met  
18 its burden and that the defendant, at this time, his  
19 application is denied.

20 MR. KEILTY: Thank you, Your Honor.

21 THE COURT: Do we have a -- is there a trial date?  
22 I mean, what's the -- how much time are we looking at before  
23 this case will --

24 MR. JACOBSON: We've only had an initial status  
25 conference, Your Honor, so the Government is still in the

1 process of producing Rule 16.

2 THE COURT: Mm-hmm. And he was originally  
3 arraigned sometime back in March?

4 MR. KEILTY: He was arraigned, Your Honor, in  
5 August of this past year. And our first status conference in  
6 front of Judge Johnson was held on I believe October 9th.

7 MR. JACOBSON: That's right. There were a number  
8 of pre-indictment orders of excludable delay in the case.

9 THE COURT: Oh. So what happened in February? I  
10 mean, what triggered this initial letter? It was just an  
11 initial appearance then?

12 MR. KEILTY: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. KEILTY: There was a complaint.

15 THE COURT: But the indictment, it took a while for  
16 the indictment to be filed?

17 MR. KEILTY: Correct, Your Honor.

18 THE COURT: Okay. All right. Thank you.

19 MR. JACOBSON: Thank you, Judge.

20 (Proceedings concluded at 2:36 p.m.)

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1 I, CHRISTINE FIORE, Certified Electronic Court  
2 Reporter and Transcriber, certify that the foregoing is a  
3 correct transcript from the official electronic sound  
4 recording of the proceedings in the above-entitled matter.

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*Christine Fiore*

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October 22, 2019

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Christine Fiore, CERT

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